HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting**)**
(Chapter VIII Rule 32 (2) (b**)**

Description of the Case.

Criminal Appeal No. 71 of 2002

Shiv Singh S/o Madho Singh … Appellant

Versus

State of Uttaranchal … Respondent

~~Approved for reporting.~~

Not approved for reporting.

Date of Decision 22nd November, 2004.

Initial of Judge.

HIGH COURT OF UTTARANCHALAT NAINITAL

Reserved

Criminal Appeal No. 71 of 2002

Shiv Singh S/o Madho Singh
R/o Village Amtora
P.S. Bageshwar
District Bageshwar … Appellant

0Versus

State of Uttaranchal … Respondent

Sri Dinesh Chauhan and Sri Sudhir Singh, Adv. for the appellant
Sri Amit Bhatt, learned A. G.A. for the State

Coram : Hon'ble M.M. Ghildiyal, J.
Hon'ble B.C. Kandpal, J.

(Delivered by Hon'ble B.C. Kandpal, J.)

This criminal appeal has been preferred by appellant Shiv Singh, against the judgment and order dated 25.01.2002 passed by Sessions Judge, Bageshwar convicting him u/s 302 IPC and sentencing for life imprisonment with a fine to the tune of Rs. 10,000/-.

In this case, according to the prosecution, the real brother alleged to have committed murder of his younger brother.

The prosecution case, in brief, is that on 17.07.2000 at about 10:30 P.M. the complainant Darban Singh and his two elder brothers, namely, Shiv Singh and Govind Singh, while sitting altogether in the outer portion of their house situated at village Amtora Distt. Bageshwar, were discussing in the matter of 13th days' rites of their mother (which is generally followed on that day when someone expires). In between the discussions, Shiv Singh accused/appellant told that he nourished the

brothers to grow up and made the residential house but the brothers have dispossessed him from the house.

The aforesaid talks led hot altercations between appellant Shiv Singh and Govind Singh deceased. Suddenly, anxious with the development, the appellant Shiv Singh assaulted to Govind Singh with an axe. After hearing shrieks of Govind Singh, Smt. Pushpa Devi wife of the complainant and his ‘Bhabhi’ Smt. Hansi Devi W/o Govind Singh came out from the house, who in order to save the life of Govind Singh, tried to intervene in the matter. But assaulting continuously with the axe, the appellant uttered that he will not leave him (the deceased) alive. With the result, Govind Singh died at the spot. His dead body was kept lying at the place of occurrence.

The complainant, on 18.07.2000 at about 1:00 A.M., has submitted written report Ext. Ka-1 at Police Station Kotwali, Distt. Bageshwar. On the basis of the Chik report, an entry was made in the register on 18.07.2000 at 2:00 P.M. and a case crime no. 501/2000 u/s 302 IPC was registered against accused/appellant Shiv Singh.

The investigation of the incident was entrusted to SSI Sri Harender Singh Bisht PW-7 who started investigating the matter and after arriving at the spot he took the accused into his custody. The I.O. prepared site plan Ext. Ka-6 and took samples of blood stained and plain earth from the spot. He also took in his possession the weapon of the assault, i.e. the axe. The IO has taken over the trouser in his possession, which the accused was wearing at the time of occurrence. The IO has prepared the inquest report on the dead body of the deceased. The IO has prepared memo/furd (recovery memos) of the articles recovered

from the spot. He than sealed the dead body in order to sent it for postmortem.

The autopsy on the dead body of Govind Singh conducted on 18.07.2000 at 11:40 A.M. at Community Health Center, Bageshwar and Doctor, N.D. Punetha PW-9 found the following anti mortem injury :-

1. Incised wound 5 cm. x 1 cm. bone deep present after right side of the mastoid region. Margins are clear cut and well depth..
2. Incised wound 3 cm. x 1 cm. muscle deep beneath right side of the ear.
3. Incised wound 4 cm. X 1 cm. bone deep present on the right side of the rope of neck. 3 cm. below the injury no. 1. Margins are clear cut and well depth..
4. Incised wound 4½ cm. x 1 cm. muscle deep present on the right side of the neck. 2 ½ cm. below the injury no. 4
5. Blood vessels were cut underneath injury no. 5.
6. incised wound 5 cm. x 1 cm. muscle deep present on left side of the neck. Margins are clear cut and well depth.
7. Left side index finger is cut from its destal finger.

On internal examination, the doctor found that the blood vessels beneath the injury no. 5 were cut. There was swelling present in the trachea and lungs, the spine was cut beneath the injury no. 3. Left chamber of the heart was empty and right chamber was full of blood. There was approximately one bowl of indigested pieces of rice in the stomach. The small and large intestine were swollen. The bile was half filled. According to the

opinion of the Doctor, the death was caused due to shock and haemorrhage on account of the aforesaid anti mortem injuries.

The weapon of assault i.e. the axe, samples of blood stained the plain earth, the trouser and the cloths of the deceased i.e. jeans sweater, handkerchief and belt were sent for chemical examination. The report of the Forensic Science Lab, UP, Agra Ext. Ka-11 is on the record.

The investigating officer has recorded the statements of the eye witnesses as well as the formal witnesses. The IO, after completion of the investigation submitted chargesheet against the accused/appellant Shiv Singh u/s 302 IPC.

After the chargesheet was submitted, the appellant was committed to the court of sessions and he stood for his trial before the Sessions Judge, Bageshwar.

The learned Sessions Judge, Bageshwar on 23.12.2000, framed charge against the appellant u/s 302 IPC. The appellant denied the charge levelled against him and claimed his trial.

The prosecution in order to support its case produced as many as nine witnesses of which PW-1 Darban Singh is the complainant and PW-2 Smt. Pushpa Devi, PW-3 Chandan Singh are the witnesses of the occurrence, PW-4 Sunder Singh Parihar is the witness of the inquest report, PW-5 Km. Puja Rawat is the child witness/eye witness, PW-6 Smt. Hansi Rawat is the eye witness, PW-7 SSI Harender Singh Bisht is the IO who conducted the investigation in the matter, PW-8 Head Constable Rajbeer Singh is the formal witness and PW-9 Doctor N.D. Punetha has conducted the post mortem on the dead body of the deceased which was brought to him in sealed covering alongwith the papers by Constable Kripal Singh.

After the investigation of the prosecution was over, the statement of the appellant was recorded u/s 313 Cr.P.C. The accused did not adduce any evidence in his defence.

The learned trial court after having perused the evidence on record and hearing to learned counsel for the parties has convicted the accused/appellant u/s 302 IPC and sentenced him for life imprisonment alongwith fine to the tune of Rs. 10,000/- vide judgment and order 25.01.2002.

Feeling aggrieved by the aforesaid impugned judgment and order the convict Shiv Singh preferred appeal before this court which is pending for disposal before us.

We have heard learned counsel for the parties and perused the evidence on record.

Learned counsel for the defence first of all argued that in this case Darban Singh (P.W.1) – informant has turned hostile. This person has lodged the First Information Report at police station and in case, if he has turned hostile then the entire basis of the prosecution case is frustrated. It has also been submitted that the First Information Report in this case is ante time.

Our attention has been invited towards the statement of Darban Singh (P.W.1) who has deposed therein that on the next day of the occurrence he went to the police station on calling of the police. He has also stated that he put his signature on a plain paper and whatever was scribed on that paper was not read over to him.

Again our attention has been invited towards the statement of Smt. Pushpa Devi (P.W.2) who has stated that her husband did not go anywhere in the night of the occurrence.

Learned counsel for the defence has, thus on the basis of the deposition of the aforesaid two witnesses has submitted that

the F.I.R. is ante time and it could not have been at the alleged time as has been stated by the prosecution.

We fail to appreciate the arguments advanced by the learned counsel for the appellant. It is true that Darban Singh (P.W.1) and Smt. Pushpa Devi (P.W.2) have turned hostile and they have not supported the prosecution case but it is to be seen whether rest of the witnesses produced by the prosecution have in fact supported the prosecution case or not and on the strength of the evidence adduced by the prosecution, whether the case is established beyond reasonable doubt or not.

In order to appreciate the argument advanced by the learned counsel for the appellant, if we go through the deposition of Chandan Singh (P.W. 3) then it reveals that he had deposed before the court that in the night when he went to the house of the deceased Govind Singh then he saw that Govind Singh was lying dead. This witness has stated that the report was lodged by Darban Singh (P.W.1) in the police station and he along with Darban Singh (P.W.1) reached police station in the night. He has also deposed in his cross examination that the police came at the spot with them in the night and prepared the formalities at the spot.

Further Km. Puja Rawat (P.W.5) – daughter of the deceased has also deposed in her statement that the police reached at the spot in the night. Smt. Hansi Rawat (P.W.6) - wife of the deceased has also stated that the police came at the spot in the night of 17/18.07.2000.

Further Head Constable – Rajbeer Singh (P.W.8) has also deposed that on 18.07.2000 he had posted at Thana Kotwali, Bageshwar and in the night at about 1:00 a.m. on 18.07.2000

the informant Darban Singh (P.W. 1) came at the police station in order to lodge the report.

Further Harender Singh Bisht (P.W. 7) – S.S.I. has also deposed that he went at the spot in the night itself. He has also stated that the inquest on the body of the deceased could not be prepared in the night due to paucity of light and the same was prepared in the morning of 18.07.2000. Therefore, all the evidence adduced by the prosecution clearly indicates that the report of this occurrence was lodged at police station in the night of 17/18.07.2000 at 1:00A.M. and after registration of the case, the police went at the spot and started other formalities. The report under these circumstances cannot be said to be ante time and the statement of Darban Singh (P.W.1) and Smt. Pushpa Devi (P.W.2) in this regard do not attach any reliance. We are, therefore, of the view that the First Information Report is without any undue delay and cannot be said to be ante time in any manner.

Learned counsel for the appellant has further argued that Km. Puja Rawat (P.W.5) and Smt. Hansi Rawat (P.W.6) both are the daughter and the wife of the deceased respectively. Their testimony cannot be said to be trustworthy. It has been submitted that in view of the major contradictions, embellishments as well as development in the statement in the testimony of these two witnesses lose their credibility.

Assessment of the evidence clearly shows that Km. Puja Rawat (P.W.5) and Smt. Hansi Rawat (P.W.6) is the daughter and the wife of the deceased respectively while the accused is the real brother of the deceased. Therefore, the eyewitnesses produced by the prosecution have no enmity against the accused/appellant and there is no reason for these witnesses to

falsely implicate the accused/appellant. The defence has not suggested anywhere as to whether the deceased was having any sort of enmity with any other person who had any grudge to kill the deceased.

It is rather clear from the evidence that the deceased was in service and had not been residing in the village. The deceased had come to the village in order to participate in the ritual rites of his mother. Therefore, any possibility of the enmity of the deceased with any other person in the village would be just an imaginary hypothesis.

Km. Puja Rawat (P.W.5) is the daughter of the deceased and at the time of her deposition she was aged about 10 years. She has stated that her father was murdered by the accused/appellant Shiv Singh who is her uncle (*TAU*) with an Axe in the night of 17.07.2000. She has specifically stated that there was some altercation between her uncle (*TAU*) i.e. the accused/appellant Shiv Singh and deceased Govind Singh (her father). In that altercation, firstly, Shiv Singh slapped her father and thereafter Shiv Singh assaulted her father Govind Singh with an Axe due to which he fell down on the earth.

Learned counsel for the appellant has submitted that the testimony of the witnesses cannot be taken to be satisfactory as the possibility of tutoring a child witness cannot be ruled out.

Again we find, the argument advanced by the learned counsel for the defence is devoid of any force, as Km. Puja Rawat (P.W.5) is the daughter of the deceased and she has no reason to falsely implicate her own real uncle (*TAU*). This witness in a natural way has categorically stated as to in what manner, the incident has taken place.

We do not find anything in the cross examination of the witness which may suggest that this witness is either tutored or is telling lie. Further the presence of this witness appears to be quite natural at the time of the occurrence. Father of this witness had come from outside, as he was in service at Mumbai. Hence, she will like to enjoy the company of her father whenever he comes to home after a long lapse of time. Therefore, if this witness was in the company of her father at the time of the occurrence then the same cannot be taken in an un-natural sense.

Smt. Hansi Rawat (P.W.6) is the wife of the deceased and she was also present in her house at the time of the occurrence. It is not disputed that the occurrence had taken place in the premises where the accused and the deceased resides. This witness has stated that she was inside her house and out side of the house Darban Singh (P.W.1), her husband Govind Singh (deceased) and her daughter Km. Puja Rawat (P.W.5) were sitting. She has stated that it was about 9:00 p.m. on 17.07.2000 when accused/appellant Shiv Singh appeared at that place and altercation started between the accused Shiv Singh and her husband Govind Singh and she was hearing that altercation from inside the house. She has stated that once she called her husband from inside the house for taking his meal, but again Shiv Singh who is the elder brother of the deceased called her husband Govind Singh out of the house then Govind Singh came out of the house with the meal in his hands. She has stated that her daughter Km. Puja (P.W.5) was also in the company of her father. There again some altercation took place between the accused/appellant and the deceased Govind Singh. She has also deposed that Shiv Singh – accused/appellant

thereafter slapped her husband and after hearing the voice of slap, she came out and asked her husband to come inside the room. She has stated that her husband replied that the accused/appellant was his elder brother, therefore, in case, if he slaps then it makes hardly a difference. This witness has further deposed that after some time Km. Puja Rawat raised hue and cry that her father was being assaulted, then she came out of the room and reached near the place of the occurrence. She saw that Shiv Singh was having an axe and was assaulting her husband Govind Singh with that axe. Nothing has come out in the cross-examination of this witness which may indicate that this witness is telling lie.

The version given by the eyewitnesses i.e. Km. Puja Rawat (P.W.5) and Smt. Hansi Rawat (P.W.6) find corroboration with the medical evidence. Both the eyewitnesses have stated that Govind Singh assaulted with an axe and it was accused/appellant Shiv Singh who assaulted the deceased with an axe.

Dr. N.D. Punetha (P.W.9) has deposed in his statement that he found seven ante mortem injuries on the person of the deceased and all the seven injuries were incised wounds. He has deposed that all the injuries could have been caused by an axe and the death of the deceased Govind Singh also could have been caused on 17.07.2000 between 10:00 to 11:00 p.m. The doctor has further deposed that the digestion process could not be started as the death was caused immediately after the deceased started taking his meal. This version of the doctor finds complete corroboration with the ocular version as the eyewitnesses have stated that the deceased was to start his meal at the time of the occurrence and meanwhile, accused/appellant

called him outside the room and the deceased came out of his room with the meal in his hand and in the meantime, the accused/appellant assaulted him with an axe resulting his death.

As we have already observed above that presence of these two witnesses i.e. Km. Puja Rawat (P.W.5) and Smt. Hansi Rawat (P.W.6) cannot be doubted in any manner. Moreover presence of these two witnesses has also been admitted by Darban Singh (P.W.1) who is the informant of the case as this witness has stated that the deceased and the accused both are the real brother. He has also stated that he and the deceased Govind Singh used to reside in the same house and Govind Singh was in service at Mumbai and on the date of the occurrence he had come to participate in the ritual rites of his mother. This witness has stated that at the time of the occurrence he was present in his room and his wife was preparing the meal and at that time he heard the hue and cry of Smt. Hansi Rawat wife of the deceased Govind Singh who was crying "*MAR DIYA – MAR DIYA*". He has further deposed that on hearing this hue and cry he came in the courtyard and saw that Govind Singh was lying on the earth. Therefore, this witness on the basis of his statement has admitted the presence of Smt. Hansi Rawat (P.W.6) at the spot at the time of the occurrence.

We are, therefore, of the definite view that the eyewitnesses produced by the prosecution i.e. Km. Puja Rawat (P.W.5) and Smt. Hansi Rawat (P.W.6) have clearly established the manner in which the incident taken place as has been alleged by the prosecution. The testimony of these two witnesses also establishes the fact that it was accused/appellant

Shiv Singh and none else who committed the murder of Govind Singh.

Another important aspect is that the place and time of the occurrence is also established on the basis of the strength of the evidence adduced by the prosecution. Darban Singh (P.W.1) and Smt. Pushpa Devi (P.W.2) are certainly hostile witnesses but as far as the time and place of occurrence is concerned, they have not disputed the same. Darban Singh (P.W.1) has categorically stated that at the time of the occurrence he came out of his room after hearing hue and cry of Smt. Hansi Rawat wife of the deceased Govind Singh. He saw that Govind Singh was lying on the earth in an injured state.

Likewise, Smt. Pushpa Devi (P.W.2) again a hostile witness has also deposed in her statement that on the date of the occurrence at about 10:00 p.m. she saw the dead body of Govind Singh in the premises of the house. Therefore, the deposition of Km. Puja Rawat (P.W.5) and Smt. Hansi Rawat (P.W.6) who are the eyewitnesses find complete corroboration with regard to the place and time of the occurrence.

Learned counsel for the appellant has further submitted that no source of light has been indicated by the Investigation Officer in the site plan. Our attention has been invited towards this aspect of the matter that the inquest on the body of the deceased could not be performed on account of the paucity of light in the night. Therefore, it was not possible for the eyewitnesses to identify the actual assailant.

It is true that the inquest on the dead body of the deceased Govind Singh could not be performed due to paucity of light but it has come in the statement of the eyewitnesses that there was moonlight in that night. Therefore, it was possible

for the police to prepare the other formalities in the moonlight as well as in the torch light but it was not certainly possible for the police to conduct the inquest on the dead body of the deceased in the moonlight. Moreover, this argument appears to be quite imaginary that the assailant could not have been identify on account of paucity of light at the time of the occurrence as before the actual occurrence of murder there was hot altercation between the deceased and the accused/appellant. It was the accused/appellant who called the deceased outside the house when he was taking his meal and the deceased on hearing the voice of his elder brother who is the accused/appellant came out of his room with the meal in his hand in order to make conversation with his brother. Therefore, under these circumstances it was not difficult for the witnesses to identify the accused/appellant who is, firstly, a very-very close relative of the deceased as well as the eyewitnesses, secondly, an altercation was going on between the deceased and the accused/appellant for the past about 1 hour and thirdly, it was a moonlight night as has been stated by the eyewitnesses produced by the prosecution. Therefore, under these circumstances, in case, if the Investigation Officer has not shown any source of light at the place of the occurrence that does not affect the prosecution case in any manner.

It is worthy to mention here that the chemical examiner report available on the record as Ex. Ka.11. It appears that the trouser which the accused/appellant was wearing at the time of the occurrence was sent for analysis to the chemical examiner. This trouser has blood spots and the chemical examiner found the human blood of group-A on that trouser.

Likewise, the axe which was recovered by the police and with which the murder had taken place was also sent for analysis to the chemical examiner and it was found that the axe had also human blood. Therefore, the report of the chemical examiner also establishes this aspect that it was the accused/appellant and none else who gave an assault on the deceased with an axe and the deceased after sustaining the injuries died at the spot.

Lastly, it has been submitted that, in case, if the assault has been made by the accused/appellant even then the case is not covered under Section 302 I.P.C. and it was a grave and sudden provocation. Hence the case comes within the ambit of 304 Part II I.P.C.

We do not find ourselves in agreement with the submission advanced by the learned counsel for the appellant. It is not a case where it can be said that the accused/appellant assaulted the deceased under grave and sudden provocation. Numbers of injuries on the person of the deceased indicate that the deceased was murdered in a brutal manner. The argument advanced by the learned counsel for the appellant would have carried some force but it appears that the accused/appellant caused repeated assaults with the axe on the person of the deceased which ultimately resulted his death. Therefore, it is a cold-blooded murder and cannot be brought within the ambit of 304 Part II I.P.C.

On the basis of the assessment of evidence, we come to the conclusion that the trial court has rightly convicted and sentenced the appellant under Section 302 I.P.C.

We do not find any ground for interference in this appeal. The appeal thus being devoid of any merit is liable to be dismissed.

The appeal is accordingly, dismissed.

(B.C. Kandpal, J) **(M.M. Ghildiyal, J)**

November 22, 2004:
ASWAL